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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-323

THEODORE W. KHEEL, G. OLIVER KOPPELL, CHESTER STRAUB, RONALD W. HAUGHTON, D'JARIS H. WATSON and ROBERT KHEEL, on behalf of themselves, and all other persons similarly situated,

Petitioners,

—against—

THE PORT OF NEW YORK AUTHORITY, JAMES C. KELLOGG, III, HOYT AMMIDON, GUSTAVE L. LEVY, JAMES G. HELLMUTH, ANDREW C. AXTELL, WILLIAM A. STERNKOPF, JR., WILLIAM J. RONAN, W. PAUL STILLMAN, WALTER H. JONES, BERNARD J. LASKER, and SIDNEY S. HEIN, COMMISSIONERS OF THE PORT OF NEW YORK AUTHORITY, AUSTIN J. TOBIN, EXECUTIVE DIRECTOR OF THE PORT OF NEW YORK AUTHORITY, and NELSON A. ROCKEFELLER, GOVERNOR OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit decided on March 24, 1972, rehearing denied May 30, 1972.

Opinions Below

The opinions of the Court of Appeals (Addendum A) have not yet been reported. The opinion of the District Court (Addendum B) is reported at 331 F. Supp. 118 (S. D. N. Y. 1970).

Jurisdiction

The Court of Appeals rendered its decision on March 24, 1972, rehearing denied May 30, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented to the Court of Appeals

Whether Petitioners have alleged a matter in controversy in excess of $10,000 in challenging agreements in the form of companion statutes enacted in 1962 (a) between New York and New Jersey and (b) between these states and the holders of bonds sold by the Port Authority purporting to prevent the said states from requiring the Port Authority to use, and the Port Authority from using, any of its funds for any "railroad purposes whatsoever" without the consent of the bondholders?

The Court of Appeals answered the question in the negative, finding, without any record support, that the benefits Petitioners would receive if they succeeded in their action were too "indirect and speculative" to support federal jurisdiction.

Questions Presented Here

1. For the purpose of determining whether the amount in controversy exceeds $10,000, may the petitioners aggregate their damages or the value of the benefits to be

achieved where petitioners' interests in the suit are common and undivided and are a matter of major importance to the 18,000,000 residents of the port district?

2. Does an appellate court err when it makes findings of fact with respect to jurisdictional issues which determine the merits of the law suit without giving petitioners the opportunity to prove the error of the Court's findings of fact?

STATEMENT OF THE CASE

A. Errors In The Court's Decision

The Agreements or Compacts between the states and between the states and the bondholders (as set forth in the 1962 statute here under attack) were never approved by Congress as required by Article I, Section 10, Subsection 3 of the United States Constitution (the Compact clause). As more fully explained below, the New York statute* also improperly gave the Port Authority power to determine the period of time in which the states may not legislate on Port Authority involvement in mass transportation. More particularly, it made it impossible for the Port Authority and the states to require the Port Authority to effectuate the purposes of the 1921 Compact between the states that brought the Port Authority into existence. The 1921 Compact was duly approved by Congress as was the 1834 Compact which it amended. So was a comprehensive plan developed by the Port Authority at the outset of its activities.

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*McKinney's Unconsolidated Laws §§ 6601-6618. The companion statute of New Jersey is the subject of another law suit held in abeyance pending the outcome of this case.

The 1921 Compact constituted the Port Authority an agency to plan the development of a coordinated system of transportation for the port district (defined as the bi-state area within a radius of 25 miles of the Statue of Liberty) which the states found had become one center or district commercially. The two states created the Port Authority because they recognized that they were incapable of separately coordinating transportation in those portions of the bi-state area beyond their respective geographical boundaries. The Port Authority was not only designated the planning agency for the port district but was given the power, with the approval of the states, to effectuate the plans it developed.

The 1962 statute prevents the use of Port Authority funds for mass transportation and thereby renders the Port Authority incapable of planning the development of a coordinated system of transportation for the port district. Set adrift by the 1962 statute from its basic purpose, the Port Authority has in fact contributed to the unbalancing of transportation by using its funds excessively to promote automobile transportation and to build the World Trade Center, the largest office building complex in the world, which has already, though not yet complete, overburdened transportation in its vicinity.

The Port Authority has also refused, in reliance on the 1962 agreements, to comply with companion laws passed by the states in 1971 directing it to build rail links to Kennedy and Newark airports.

The Court of Appeals did not believe that correction of the massive wrongs inflicted by the 1962 statute "would lead directly, or even indirectly, to a lessening of transportation costs or provision for radically better service in the near future, given the complex and slow-moving nature of major mass transportation renovation." Petitioners would receive no direct economic benefit from victory the

Court said, "for the desired new subways and buses* would be far from realization" since, "at this point, it is pure conjecture to suggest when they would appear and how much money they would save plaintiffs."

In so holding, the Court drew the following unwarranted conclusions of fact:

1. That the only benefit which victory could bring Petitioners was a new subway.

2. That the unbalanced transportation system, now costing residents of the port district billions of dollars in traffic congestion and air pollution, could only be coordinated by a new subway.

3. That reducing fares and increasing tolls, both within the Port Authority's capacity, would be of no immediate, measurable financial value to the Petitioners and other users of mass transportation in the port district.

4. That there are no other ways in which the Port Authority's unquestioned talents and resources (now exceeding a borrowing capacity of 2 billion dollars) could be utilized sufficiently soon to provide Petitioners with adequate relief to grant federal court jurisdiction.

5. That the 1921 mandate to plan and develop a coordinated system of transportation through a bi-state agency, uniquely qualified to perform this essential function for the benefit of the 18,000,000 port district residents, now frustrated by the 1962 statute, could not be of sufficient value to the people in the district to warrant federal court concern, and

*The Court incorrectly included buses as beyond any practical benefit Petitioners could expect from victory. The 1962 agreements prevent the use of Port Authority funds for any "railroad purposes", i.e., subways or commuter railways.

6. That the rail links to the airports, plans for which are virtually complete, could not be built in time to be of meaningful financial help to Petitioners.

The Court's ruling also means that critical conclusions of fact can be made by an appellate court without affording Petitioners the opportunity through a trial of the facts to prove the correctness of their claims.

It also means that the longer Petitioners are denied relief, the less the amount in controversy, given the length of time the Court believes it will take to remedy the damages imposed by the violations.

Above all, it means that Petitioners are not entitled to invoke the jurisdiction of the federal courts to redress massive violations of the 1921 Compact, approved by Congress, by attacking the constitutionality of the 1962 statute, which Congress never approved, unless they can show individually to the satisfaction of an appellate court without a trial of the facts that they stand to gain in excess of $10,000 from victory in the suit. Regardless of how many billions of dollars in benefits users of mass transportation may obtain in the aggregate or the billions in damages they may avoid, federal jurisdiction must be denied for reasons having to do with the triviality or insignificance of the claim.

B. The 1921 Compact And the Port of New York Authority

The Port Authority was created by New York and New Jersey to cope with the transportation problems of the bi-state area they called the port district. This area, they found, had become one commercial center or district. Separately the states lacked jurisdiction to coordinate transportation in this area, and thus they created a new entity with powers greater than those which could be given to an agency of a single state. Primarily, the Port Authority

was created as a planning agency for the port district. Unlike most planning agencies, it was also given the power to effectuate the plans it developed with the approval of the states. To this day, the Port Authority is the only agency with jurisdiction over the port district with the duty as well as the capacity to plan and develop a coordinated system of transportation. To say that a coordinated system of transportation is essential and that the system, if it can be called one, now functioning in the port district is uncoordinated are statements of fact no one will deny. Unless the Port Authority fulfills the vital assignment it was given in 1921 and made incapable of performing in 1962, the port district will continue to decline as people in this area find it impossible to get around.

In the beginning the Port Authority hewed close to the line it was told to follow. But then it discovered gold in bridge and tunnel tolls. Originally it planned to discontinue the tolls once the facilities had been paid for. But the temptation was overwhelming. The Port Authority decided to hold on to the surplus funds and to use them as a base for borrowing additional funds for additional facilities. Noting the absence of any provision in the 1921 Compact giving it the power to tax or pledge the credit of the states, the Port Authority concluded that it could only invest in self-supporting, i.e., profitable enterprises. It quickly discovered that mass transportation was doomed to be unprofitable, and concluded that it could not invest in such facilities regardless of how much money it made elsewhere. Instead of an agency to coordinate transportation, it became an agency of expansion into money making enterprises.

In 1961 the Port Authority sought permission from the states to build the World Trade Center. New Jersey objected unless the Port Authority agreed to take over the money-losing railroad between New York and New Jersey

(the Hudson Tubes) then carrying approximately 10,000 passengers a day. The Port Authority counter proposed that New York and New Jersey agree with each other that they never again ask the Port Authority to invest in any other money-losing mass transportation facility. The states were told that such an agreement was necessary to enable the Port Authority to market its bonds. But the Port Authority had experienced no difficulty in marketing its bonds up to that time. Its real purpose was to keep the Port Authority out of mass transportation. The danger was not that the Port Authority's ability to sell bonds would be impaired but that the states might again ask the Port Authority to carry out its original mandate by including mass transportation in the coordinated system of transportation it was supposed to develop. The Port Authority was searching for a device that would prevent the states from requiring its entry into mass transportation for an indeterminate period in the future.

C. The 1962 Statute

The device turned out to be the unique agreements the states concluded in 1962 in the form of companion statutes. In this suit the Petitioners attack the constitutionality of the New York statute. A similar suit against the New Jersey suit is being held in abeyance pending the outcome of this litigation.

The statutes form two agreements. One by the states with each other and the other by the states with future holders of Port Authority bonds. No agreement was ever signed by the states nor is any agreement signed by the states with bondholders as the Port Authority sells one series of bonds after another with the commitment of the states not to require the Port Authority to use any if its funds for any railroad purposes.

The 1962 statute is not merely an amendment of the 1921 Compact. It is two new and novel statutory agreements between the states and by the states with undesignated bondholders not to legislate for as long as the Port Authority has bonds outstanding. The most recent issue of bonds is scheduled to expire in 2007 and the Port Authority claims that it cannot use any of its funds for mass transportation until that date. In consequence the 1962 agreements do not only purport to amend the 1921 Compact but also to prevent the states from rescinding this amendment as they now wish.

For the last three years, Governors Cahill and Rockefeller have been seeking to involve the Port Authority in mass transportation with a singular lack of success. Their failure is attributable entirely to the restrictive provisions of the 1962 agreements. In 1971 the Governors proposed and the legislatures of their states enacted companion laws authorizing and directing the Port Authority to build rail links to the airports.

The 1962 laws direct the Port Authority not to use their funds for mass transportation. The 1971 laws tell them to use their money for mass transportation links to the airports. The 1971 laws represent the most recent expression of the legislative intent of the two states and thus should govern. But the Port Authority maintains that the 1962 statute must govern as the states have covenanted with each other and the bondholders that they can not require Port Authority involvement in mass transportation, and that the covenant is binding upon the states until the last bond is paid off on 2007. But that directly contravenes the legislation the states passed in 1971.

Failure to resolve the issue raised in this suit will not only delay the day the Port Authority responds to the wishes of the Governors and the direction of the legislatures of the two states, but will almost certainly forestall the sale of any more Port Authority bonds. Mr. B. W. Harris,

of Standard and Poor's, the agency that rates Port Authority bonds, recently stated: "How these two goals [the clash of the 1962 prohibition on Port Authority involvement in mass transportation and the 1971 directive that it build rail links to the airports] can be met under existing statutes and bi-State agreements poses a question which must be resolved before the next Port [Authority] bond sale."

Recently Governor Rockefeller persuaded the legislature of New York to repeal New York's side of the 1962 agreement. But, it is argued, this repeal will not release the Port Authority from non-involvement in mass transportation until the bonds are paid off. To obtain immediate Port Authority involvement, the 1962 statute must be declared unconstitutional. Only then will it be possible for the states to compel the Port Authority to carry out the original mandate of the 1921 Compact and the present wishes of the Governors and the states.

D. The Proceedings Below

The complaint was filed on March 4, 1971. On April 23, 1971 defendants moved to dismiss, citing four grounds to support their motion. On July 28, 1971 Hon. Harold Tyler granted the motion, relying upon a fifth ground, not raised by the defendants nor briefed by Petitioners. Judge Tyler held that in view of *Courtesy Sandwich Shops, Inc.* v. *Port of New York Authority,* 12 N. Y. 2d 379, appeal dismissed 375 U. S. 78, rehearing denied 375 U. S. 960 (1963), bi-state legislative amendments to the compact were permitted "at least as to amendments which do not abrogate to the Port Authority powers and duties exceeding those contemplated by the original compact."

He then held, without any factual support or analysis, that:

> "the Amendment herein challenged, far from accomplishing an accretion of the powers of the Port

> Authority, effects a construction or diminution of those powers previously acknowledged and exercised." (331 F. Supp. at 121.)

He concluded that the power to redress any imbalance lay in Congress and not the courts, since Congress reserved the right to "alter, amend or repeal" the Compact.*

The Petitioners moved to reargue, contending that (1) the "Amendment," constituted a new agreement between the two states, restricting their future legislatures, and as such required Congressional consent, and (2) the provision, by reducing the *responsibilities* (no "powers" were diluted), had the effect of giving the Port Authority greater *financial powers* in those areas where it still had responsibilities. In particular, by exonerating the Port Authority from mass transportation responsibilities, the legislation fathered the one-sided automobile development which by air, noise and traffic pollution is strangling the port district. Judge Tyler denied the motion to reargue without opinion and Petitioners appealed.

On appeal the Petitioners argued that Judge Tyler erroneously decided the issue. The Port Authority in response abandoned Judge Tyler, implicitly recognizing the error of his opinion, and argued anew the four grounds not passed upon by Judge Tyler, one of which was want of $10,000 in controversy.

The Court of Appeals affirmed, but found that Judge Tyler need not have reached his point. It held that the Petitioners had failed to demonstrate Federal Court jurisdiction by showing that the amount involved in the controversy exceeded $10,000.

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*This latter point is extremely suspect, and, in any event, the Port of New York Authority itself, in *U. S.* v. *Tobin*, 306 F. 2d 270, 272 (D. C. Cir. 1962) urged that "Congress does not have power, under the compact clause of The Constitution, to 'alter, amend or repeal' its consent to an interstate compact . . ."

The Court correctly observed that the test for "matter in controversy involved the "value of the right being protected" when damages are not requested. However, the Court then indicated that it was not at all clear that if Petitioners prevailed it would lead "directly or even indirectly, to a lessening of transportation costs or provision of radically better service in the near future."

It held, in short, that Petitioners were seeking only "indirect" relief and found as a *fact* that "were § 6606 declared unconstitutional plaintiffs would receive no direct economic benefit, for the desired new subways and buses would be far from realization." In other words, because § 6606 (the 1962 statute) prevents the Port Authority from assisting in a critically important and extremely expensive area, Petitioners are not entitled to better transportation at any time because of the very importance and expense of the rights they seek to vindicate. The circularity of the opinion defies logic.

POINT I

THE COURT OF APPEALS ERRED IN NOT AGGREGATING THE "COMMON AND UNDIVIDED INTERESTS" SOUGHT TO BE VINDICATED.

It has been clearly established that for purposes of computing the $10,000 in controversy where plaintiffs seek to vindicate a "common and undivided interest" their individual benefits may be aggregated. *Snyder* v. *Harris,* 394 U. S. 332, 35 (1968) ("Aggregation has been permitted only . . . in cases where two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest."); *Gibbs, Attorney General, et al.* v. *Buck,* 307 U. S. 66, 219 (1939) ("federal jurisdiction will be adequately established . . . if to the aggregate of all the members in this representation suit, the matter

in controversy is of that value.") Chief among the kind of actions which qualify for this treatment are derivative actions, where shareholders sue to enforce a corporate right, e.g., *Weiss* v. *Sunasco Incorporated,* 316 F. Supp. 1187 (E. D. Pa. 1970). However, this principle has been applied in other contexts. *Gibbs* v. *Buck, supra* at 74 ("The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights"); *Berman* v. *Narragansett Racing Association,* 414 F. 2d 311 (1st Cir. 1969) ("We think it is the amount of the entire fund, and not what each purse winner's individual share will eventually be, that determines the amount in controversy here."); cf. *Cashman* v. *Port Authority,* 319 F. Supp. 1264 (S. D. N. Y. 1970).

In *Brown* v. *Trousdale,* 138 U. S. 389 (1891), hundreds of taxpayers of a county sought for themselves and all other taxpayers in the county a decree declaring invalid certain bonds issued by the county. For the purpose of computing the requisite amount in controversy, the principal amount of the bonds was used on the theory that the right or interest the plaintiffs sought to vindicate represented a right common to every member of the class. The primary purpose of the suit was deemed to be the declaration of the invalidity of the bonds.

Here Petitioners, citizens and users of transportation—mass and road—seek to compel the bi-state agency to perform, as originally intended, unencumbered by the unconstitutional limitation of the 1962 statute. They seek, in short, to compel the directors of the bi-state agency to act as they were supposed to—and not in accordance with its past policy of ignoring the statutory mandates and looking to the bond market rather than the public interest. In every sense this action is analagous to a derivative

suit. Such a consideration was used in the *Berman* case to sustain aggregation. "As we view it, the case before us is analagous to a shareholder's derivative action or a suit against a trustee . . ." 414 F. 2d at 315.

The common and undivided nature of the pressing need for better transportation, common to *all* residents in the port district, has been demonstrated vividly even since this action was commenced. Pollution and traffic congestion have increased. The quality and quantity of mass transportation has decreased as the fares have increased. In response the States of New York and New Jersey in 1971 directed the Port of New York Authority to construct certain rail links from the center of New York City and Newark to Kennedy and Newark airports, respectively. But, now over a year later the Port Authority has yet to implement this directive by allocation of so much as a penny toward its construction. The result is to delay that much longer the benefits residents and users of transportation in the port district will receive when the legislative will is complied with.

POINT II

THE COURT OF APPEALS SHOULD NOT HAVE MADE FINDINGS OF FACT IN DETERMINING THE JURISDICTIONAL ISSUE.

The "amount in controversy" should be determined from the standpoint of the plaintiff, and this Court in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283 (1938) declared that it must appear to a "legal certainty" that the claim is less than $10,000 before a case may be dismissed:

> "The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that,

> unless the law gives a different rule, the sum claimed by plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *Id.* at 288.

And in *Horton* v. *Liberty Mutual Ins. Co.*, 367 U. S. 348, 353 (1961), this court said:

> "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith we have said that it 'must appear to a legal certainty that the claim is really for less that the jurisdictional amount to justify dismissal.' "

Pursuant to this rule the requisite amount in controversy has been found in numerous cases analagous to this one. In *Berk* v. *Laird*, 429 F. 2d 302 (2d Cir. 1970), the court sustained jurisdiction of an action involving an army private seeking to enjoin being sent to Vietnam; in *City of Memphis, Tennessee* v. *Ingram*, 195 F. 2d 338 (8th Cir. 1952), the court sustained jurisdiction of a suit "to protect the continuous operation of said waterways to Harahan Bridge for use and benefit of the citizens of Memphis"; in *Dodge* v. *Nakai*, 298 F. Supp. 17 (D. Ariz. 1968), the court sustained jurisdiction where the "central event common to all causes of action is the exclusion of the plaintiff Mitchell from the Navajo Indian Reservation." Cf. *Jaconski* v. *Avisun Corporation*, 359 F. 2d 931 (3d Cir. 1966); *Deutsch* v. *Hawes Street Realty Corporation*, 359 F. 2d 96 (3d Cir. 1966).

Contrary to the holdings of these cases, the Court of Appeals, determining the merits of the action, made a *finding of fact*, that the relief sought was too indirect and

speculative to sustain jurisdiction. It asserted, without evidentiary basis that:

> "Were § 6606 declared unconstitutional, plaintiffs would receive no direct economic benefit, for the desired new subways and buses would be far from realization."

This conclusion is both wrong as a factual matter, and incorrect as a basis for a Court of Appeals to bottom its decision.

The Court of Appeals should not have telescoped the complaint into a mere request that more "subways and buses" be put in operation. The complaint seeks far more. It seeks to have the Port Authority pursue its original mandate, and pursuant thereto, to coordinate mass transportation and vehicular transportation. It is not the function of an appellate court to determine, without a record, the merits of the controversy. But, that is precisely what the Court did, in determining whether the plaintiffs might benefit sufficiently from the extensive relief they seek. At the very least the Court, if it desired to pursue this avenue, should have remanded to the District Court for findings of fact.

In reaching its decision, the Court cited *Rosado* v. *Wyman,* 414 F. 2d 170 (2d Cir. 196), *rev'd on other grounds,* 397 U. S. 397 (1970)* where the Second Circuit had determined that the welfare recipient plaintiffs stood to gain substantially less than $10,000—the *liquidated* amount of the reduced welfare payments complained of by plaintiffs.

The Court also based its decision on *Kiernan* v. *Lindsay,* 334 F. Supp. 588 (S. D. N. Y. 1971), where the

*The split decision of the Second Circuit was reversed by this Court on both jurisdictional grounds and the merits. This Court found it unnecessary to review the $10,000 discussion since pendant jurisdiction was found to exist in any event.

"rights" involved were (a) the statutory Taylor Law penalties of $600 and (b) a year's suspension of tenure. In that instance, the speculativeness of the monetary value is obvious. The contrast to this action and the concrete injury and potential gain is striking. And in *Massachusetts State Pharmaceutical Association, et al.* v. *Federal Prescription Service,* 431 F. 2d 130 (8th Cir. 1970), also cited by the Court of Appeals, the finding of fact with respect to the plaintiffs lack of proof of $10,000 in damages came *after* trial.

In each of these cases the Court had before it, from the pleadings or from the facts established at trial, a basis upon which to reach its legal determination that $10,000 was not in controversy. It could thus determine to a "legal certainty" that those facts did not support the claim that the amount in controversy exceeded $10,000.

This is not the case here. Petitioners in good faith claim that if the Port Authority is free to invest in mass transportation facilities, and if it is free to plan and develop a coordinated system of transportation for the bi-state port district, as it was initially permitted and required to do in the Congressionally approved bi-state Compact, then Petitioners (and other members of the class) will benefit substantially—individually and in aggregate—in an amount aggregating billions of dollars.

The Court of Appeal's conclusion, in the absence of any record support, that the slowness with which subways are constructed precludes a plaintiff from benefitting in an amount in excess of $10,000 is cavalier, pessimistic and erroneous. It assumes, without any factual basis, that a coordinated attack on the commutation problems in the port district cannot lead to quick success. It assumes facts concerning the feasibility of innovation and capital construction. It ignores that tomorrow the Port of New York Authority can raise bridge and tunnel tolls to discourage rush hour travelling, and thereby benefit mass transporta-

tion. It ignores that the Port of New York Authority can use additional money to improve existing rail facilities, buy new rail equipment to improve service and subsidize the fares of subways and commuter rail lines *now*. It can do many things—which it has thus far refused to do.

The vice of the Court's decision is the failure to comprehend the interrelation between *all* forms of transportation. This failure arose because it tried to make determinations of facts on the merits of the controversy on appeal of a motion to dismiss. If the 1962 statute is declared unconstitutional immediate benefits will accrue. Petitioners ought to be allowed to demonstrate that such is the case.

CONCLUSION

It is respectfully submitted that the Court below has decided a federal question in a way which conflicts with decisions of this Court and moreover, it has so far departed from the accepted and usual cause of judicial proceedings as to call for an exercise of this Court's power of supervision. For the foregoing reasons it is respectfully submitted that a Writ of Certiorari should be issued, so that a matter of major importance to the petitioners, the users of mass transportation, and the 18,000,000 residents of the port district may be heard by the Federal courts.

Respectfully submitted,

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Addendum A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 367—September Term, 1971

(Argued January 17, 1972 Decided March 24, 1972)

Docket No. 71-1917

THEODORE W. KHEEL, *et al.*,

Plaintiffs-Appellants,

v.

THE PORT OF NEW YORK AUTHORITY, *et al.*,

Defendants-Appellees.

Before: SMITH, HAYS and MULLIGAN, *Circuit Judges.*

Appeal from dismissal of action to declare invalid N. Y. Unconsol. Laws § 6606, in the United States District Court for the Southern District of New York, Harold R. Tyler, *Judge.* Affirmed for lack of requisite amount in controversy.

SMITH, *Circuit Judge:*

Appellants, a group of residents, citizens, taxpayers of New York city and state, and users of mass transportation facilities in the city, challenge a 1962 New York statute which limits the Port of New York Authority's power to construct or invest in non-self-supporting railroad transportation facilities. N. Y. Unconsol. Laws § 6606 (McKinney Supp. 1971). Appellants claim that this legislation, which in addition to the provisions complained of, authorized the Port Authority to purchase the Hudson-Manhattan Tubes and build the World Trade Center in lower Manhattan, prevents the Authority from fulfilling its duty to plan and construct coordinated transportation facilities in the

port district. They claim that the statute is unconstitutional because it is an interstate compact not approved by Congress, in violation of Article 1, § 10, clause 3 of the United States Constitution, and because it is an improper delegation of legislative authority in violation of the Fourteenth Amendment. Kheel requests the issuance of a declaratory judgment that the 1962 legislation is unconstitutional and that the Port Authority is violating its mandate and an order that the Authority submit to the court a plan for the development of transportation in the port area. The United States District Court for the Southern District of New York (Harold R. Tyler, *Judge*) dismissed the suit on the basis of lack of a substantial federal question. We affirm on the ground of failure to meet the jurisdictional amount under 28 U. S. C. § 1331(a).

The Port Authority was created in 1921 by a compact between New York and New Jersey, to which the consent of Congress was obtained. Laws of New York, 1921, Art. VI, Ch. 154; Laws of New Jersey, 1921, Ch. 151; Pub. Res. No. 17, 67th Cong., 1st Sess., 42 Stat. 174 (1921). The purpose of the compact was to coordinate the growth of transportation and terminal facilities in the port area. Transportation facilities were broadly defined and included railroad facilities "for use for the transportation or carriage of persons or property." N. Y. Unconsol. Laws § 6423 (McKinney 1961). The Authority was ordered to devise plans for the development of the port district from time to time, but few specific duties were imposed. Future projects were contingent on the development by the two states of a comprehensive plan for the port. Art. XI, VI, X, 1921 Compact.

The comprehenive plan was passed in 1922. Laws of New York, 1922, Ch. 43; Laws of New Jersey, 1922, Ch. 9; 42 Stat. 822 (1922). Most of the provisions were

directed at alleviation of freight problems, the most pressing difficulty in the port area at that time. Although the early emphasis was on freight transportation, the Authority was empowered to construct tunnels and bridges, which would also benefit passengers, and to proceed with further projects when directed by the states to do so.[1]

In 1962 the two legislatures passed the statutes under attack in this litigation. Laws of New York, 1962, Ch. 209; Laws of New Jersey, 1962, Ch. 8. They authorized and ordered the Authority to acquire the Hudson Tubes railroad system and to construct a World Trade Center in lower Manhattan. In directing the Authority to enter the field of passenger railroad operations (with the Hudson Tubes), of which none in the port area is self-supporting, the states provided that the Authority "not proceed with the effectuation of any railroad or railroad facility in addition to the Hudson Tubes and Hudson Tubes extensions until hereafter expressly authorized by the two states." N. Y. Unconsol. Laws § 6603 (McKinney Supp. 1971).

In addition, the states and Authority bondholders covenanted that "neither the states nor the Port Authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues, or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth." Permitted purposes do not include passenger railroads that are not self-support-

[1]In 1959 the states passed concurrent legislation permitting the Authority to purchase and own railroad cars for the purpose of leasing them to commuter railroads within the electing state. The money used by the Authority to purchase the cars had to be guaranteed by the state before the Authority could proceed. Laws of New York, 1959, Ch. 638; Laws of New Jersey, 1959, Ch. 25.

ing or do not operate within strict deficit limits outlined in section 6606.[2]

The district court dealt only with the issue of the presence of a federal question to confer jurisdiction on the court. We find it unnecessary to reach that point, however, for plaintiffs did not show the requisite $10,000 in controversy as required for federal jurisdiction under 28 U. S. C. § 1331. The burden of proving jurisdictional prerequisites lies on the party who seeks the exercise of jurisdiction in his favor. "[I]nquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf . . . [H]e must carry throughout the litigation the burden of showing that he is properly in court." *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936); *Post* v. *Payton*, 323 F. Supp. 799, 804 (E. D. N. Y. 1971).

Generally, for this reason, the amount in controversy is calculated from the plaintiff's standpoint; "the value of the suit's intended benefit" or the value of the right being protected or the injury being averted constitutes the amount in controversy when damages are not requested. *Massachusetts State Pharmacists Assn.* v. *Federal Prescription Service*, 431 F. 2d 130 (8th Cir. 1970); Wright, Federal Courts §§ 33, 34 (2d ed. 1970). Appellants allege that the difference between the amount Mr. Kheel must now spend on taxicabs and other means of transportation around the city in connection with his work and the lesser amount he would spend were the mass transport system adequate to

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[2]Effective June, 1971, the states directed the Port Authority to provide rail access to Kennedy and Newark Airports from Newark and New York. Laws of New York, 1971, Ch. 474, 475; Laws of New Jersey, 1971, Ch. 245. Studies are presently being done by financial and engineering consultants on the project. The question of any incompatibility of the rail links legislation with the 1962 bondholders covenant with the states is not raised in this action.

his needs is the amount in controversy. The difference is alleged to be $25 a week or $1350 a year. Assuming an annual expenditure of this magnitude for the next nine years (i.e. until Mr. Kheel reaches retirement age) $10,000 is exceeded.[3]

Appellees claim that these damages are too indirect and speculative to support federal jurisdiction, for it is not at all clear that victory in this lawsuit and the declaration that section 6606 is unconstitutional would lead directly, or even indirectly, to a lessening of transportation costs or provision of radically better service in the near future, given the complex and slow-moving nature of major mass transportation renovation. We agree. As this court said in *Rosado* v. *Wyman*, 414 F. 2d 170 (2d Cir. 1969), *rev'd on other grounds*, 397 U. S. 397 (1970). " 'Indirect damage' is too speculative to create jurisdiction under Section 1331." 414 F. 2d at 176. The federal courts cannot take cognizance under section 1313 of cases in which the rights are not capable of valuation in monetary terms. And the jurisdictional test is applicable to that amount that flows directly and with a fair degree of probability from the litigation, not from collateral or speculative sources. *Rosado, supra; Kiernan* v. *Lindsay*, 334 F. Supp. 588 (S. D. N. Y. 1971); *Johnson* v. *New York State Education Department*, 319 F. Supp. 271 (S. D. N. Y. 1970), *aff'd on other grounds*, 449 F. 2d 871 (2d Cir. 1971).[4]

---

[3]The Port Authority claims that this sum, when capitalized to its present value, does not exceed $10,000. Relying as we do on the nature, rather than the amount of the expenses, we need not enter into nice questions of capitalization technique.

[4]In that case plaintiffs challenged a New York statute which granted free textbooks to schoolchildren in grades 7-12 but not to those in grades 1-6. The court found that damage resulting from reasonably anticipated loss of educational opportunity was too speculative to support federal jurisdiction.

The cost to Kheel for his transportation falls under this interdiction. Were section 6606 declared unconstitutional, plaintiffs would receive no direct economic benefit, for the desired new subways and buses would be far from realization. At this point it is pure conjecture to suggest when they would appear and how much money they would save plaintiffs.[5] Nor is *Berk* v. *Laird*, 429 F. 2d 302 (2d Cir. 1970), cited by plaintiffs, apposite. In that case a serviceman sought an injunction against those military officers who had ordered him to Vietnam and Cambodia. The court found an allegation that plaintiff's earning capacity might be impaired in excess of $10,000 by serious injury or death sufficient to create federal jurisdiction. In that situation, a serious question of personal liberty was involved and plaintiff had no forum other than the federal court in which to seek redress. As the court in *Kiernan* v. *Lindsay*, *supra*, stated, that holding ought to be narrowly construed and confined to its rather unique facts.[6]

For the above reasons, we find that the amount in controversy does not exceed $10,000 and that the order of dismissal must be affirmed.

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[5]Nor is it clear that future costs such as those plaintiffs claimed can be taken into account for jurisdictional purposes. See *Eisen* v. *Eastman*, 421 F. 2d 560 (2d Cir. 1969), *cert. denied*, 400 U. S. 841 (1971); *Dougall* v. *Sugarman*, 330 F. Supp. 265 (S. D. N. Y. 1971); *Greater Hartford Free Bridge Association* v. *Greater Hartford Bridge Authority*, 172 F. Supp. 244 (D. Conn. 1958), *aff'd* 265 F. 2d 656 (2d Cir. 1959).

[6]Similarly, *Friedman* v. *International Ass'n of Machinists*, 220 F. 2d 808 (D. C. Cir.), *cert. denied*, 350 U. S. 824 (1955) involved a situation in which it was virtually certain that plaintiff workman would suffer damages of more than $3,000 as a direct result of loss of union membership, at issue in the action.

Addendum A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1917

THEODORE W. KHEEL, *et al.*,
Plaintiffs-Appellants,

v.

THE PORT OF NEW YORK AUTHORITY, *et al.*,
Defendants-Appellees.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied. Judge Kaufman did not participate in consideration of the petition.

HENRY J. FRIENDLY
Chief Judge

May 30, 1972

Addendum B

UNITED STATES DISTRICT COURT

S. D. NEW YORK

No. 71 Civ. 956

July 28, 1971

THEODORE W. KHEEL, *et al.*,

Plaintiffs,

v.

THE PORT OF NEW YORK AUTHORITY, *et al.*,

Defendants.

OPINION

TYLER, *District Judge.*

As local residents, citizens, voters, and taxpayers dependent upon mass transportation facilities, plaintiffs seek a declaration pursuant to 28 U. S. C. § 2201[1] that a 1962 amendment to The Port of New York Authority Compact,[2] which restricts the power of the subject bi-state agency to devote its revenues to nonself-supporting rail facilities, is unconstitutional in light of the compact clause, Article I, section 10, clause 3, U. S. C., and the commerce clause,

[1]Additional relief in terms of a mandate to the Port Authority to plan particular mass transportation facilities, sought in the complaint appears to have been abandoned at oral argument, or at least will be deemed so for the purpose of this decision.

[2]McKinney's 1962 Session Laws of New York, Vol. I, ch. 209, § 6, at 418.

Article I, section 8, clause 3, U. S. C. In addition, plaintiffs argue that the amendment effects a constitutionally impermissible delegation of future legislative authority to provide for mass transit facilities to private persons, the bondholders.

Defendants are The Port of New York Authority ("Port Authority"), its Commissioners and Executive Director, and the Governor of New York State. Defendants' motion to dismiss the complaint for lack of subject matter jurisdiction, 28 U. S. C. § 1331(a), and for failure to state a claim for relief, Rule 12(b) (6), 28 U. S. C., is the subject of this decision.

The relevant background can be briefly outlined. In 1921, New York and New Jersey entered into a compact creating the Port Authority, one of whose tasks was to develop facilities for the transportation of freight and persons in the Port of New York district. Laws of N. Y. 1921, ch. 154; Laws of N. J. 1921, ch. 151. Congress approved this compact, as required by the compact clause, *supra*. Pub. Res. No. 17, 67th Cong., 1st Sess., 42 Stat. 174 (1922). Subsequently, the two states and the Congress approved the original Comprehensive Plan. Laws of N. Y. 1922, ch. 43; Laws of N. J. 1922, ch. 9; Pub. Res. No. 66, 67th Cong., 2d Sess., 42 Stat. 822 (1922).

Pursuant to the compact requirement that the Port Authority obtain approval from the founding states' legislatures before undertaking additional projects, the legislatures of New York and New Jersey authorized, in 1962, the construction by the Port Authority of the "World Trade Center" and the purchase of the Hudson Tubes. This legislation, which was not submitted for Congressional approval, contained the limiting provision (herein-

after the "transit amendment") at issue, which states in relevant part:

> "The two states covenant and agree with each other and with the holders of [Port Authority] bonds, * * * that so long as any of such bonds remain outstanding and unpaid * * * neither the states nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this Act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth." McKinney's 1962 Session Laws of New York, Vol. I, ch. 209, § 6, at 418-419.

"Permitted purposes" include railroad facilities that are either self-supporting or accomplished within specified deficit limits. *Ibid.*

[1] Diversity of citizenship being absent, plaintiffs must show that a substantial federal question is directly in issue. 28 U. S. C. § 1331(a). For the reasons stated hereinafter, I hold that plaintiffs have failed in this task and grant defendants' motion to dismiss.

Plaintiffs' major claim to a federal forum arises from the conceded absence of Congressional approval of the transit amendment. Ironically, the same constitutional argument was pressed by the Port Authority bondholders before this very court in an attack upon another provision of the 1962 compact amendments which authorized construction of the "World Trade Center", whose twin towers now dominate the lower Manhattan landscape. Port

Authority Bondholders Protective Committee v. Port of New York Authority, 270 F. Supp. 947 (S. D. N. Y. 1967), affirmed 387 F. 2d 259 (2d Cir. 1968). While the decision in *Bondholders* explicitly recognized that a claim of collision with the compact clause "arises under the * * * Constitution" in the terms of the jurisdictional statute, it was held therein that the compact clause question lacked the substantiality requisite to confer jurisdiction because foreclosed by previous decisions in Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 12 N. Y. 2d 379, 240 N. Y. S. 2d 1, 190 N. E. 2d 402, appeal dismissed 375 U. S. 78, 84 S. Ct. 194, 11 L. Ed. 2d 141, rehearing denied 375 U. S. 960, 84 S. Ct. 440, 11 L. Ed. 2d 318 (1963). *Bondholders, supra,* citing Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 105-106, 53 S. Ct. 549, 77 L. Ed. 1062 (1933). Although the transit amendment, here at issue, was not involved in *Bondholders* or its predecessor, I view the disposition in *Courtesy Sandwich Shop* as predominantly a legal one and, therefore, equally controlling of this case.

In *Courtesy Sandwich Shop, supra,* the New York Court of Appeals refused to enjoin condemnation of respondents' properties on the grounds that the "World Trade Center" authorizing legislation violated neither the just compensation nor compact clauses of the federal Constitution. Of necessity, both grounds were decided on the merits. Respecting the compact clause claim, which tracks in form the claim here made, the court held that the requisite consent was contained in the Congressional resolutions approving the original compact and comprehensive plan, since that consent attached to provisions of the bi-state enactments according amendatory power to the two state legislatures

acting alone.[3] The appeal to the Supreme Court from that decision was dismissed in a brief *per curiam* "for want of a substantial federal question." Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 375 U. S. 78, 84 S. Ct. 194, rehearing denied 375 U. S. 960, 84 S. Ct. 440 (1963). Traditionally, such a dismissal is tantamount to an affirmance of the case on the merits. *Bondholders, supra,* citing Ohio ex rel. Eaton v. Price, 360 U. S. 246, 247, 79 S. Ct. 978, 3 L. Ed. 2d 1200 (1959) (separate memorandum of Brennan, J.); Wright, Federal Courts § 108, at 431 (1963).

[2] It follows that, at least as to amendments which do not abrogate to the Port Authority powers and duties exceeding those contemplated by the original compact, *Courtesy Sandwich Shop* forecloses the claim that concur-

[3] "* * * assuming consent to be required for this sort of action concurrent, the consent originally given in 1921 and 1922 to the bi-state compact creating the Port Authority expressly contemplated such further co-operative legislation in furtherance of port purposes as was here accomplished. (Pub. Res. No. 17, 67th Cong., 1st Sess., 42 U. S. Stat. 174; Pub. Res. No. 66, 67th Cong., 2d Sess., 42 U. S. Stat. 822). Among the Articles of Agreement consented to were Articles III, VII and VI, which created the Port Authority with the powers enumerated plus 'such other and additional powers as shall be conferred upon it by the legislature of either state, concurred in by the legislature of the other.' Similarly, Article XI, following the agreement for an initial comprehensive plan in Article X, provides that the Port Authority should 'from time to time make plans for the deveolpment of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two States, they shall be binding upon both States with the same force and effect as if incorporated in this agreement.' Chapter 209 clearly falls within the congressional consent given to the articles contemplating the grant to the Port Authority of additional powers within the framework of the compact." Ibid. 12 N. Y. 2d at 391, 240 N. Y. S. 2d at 7, 190 N. E. 2d 402.

rent legislative amendments, not specifically consented to by the Congress, violate the compact clause. The amendment herein challenged, far from accomplishing an accretion of the powers of the Port Authority, effects a constriction or diminution of those powers previously acknowledged and exercised. Given that the purpose of the compact clause was to prohibit "the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States", Virginia v. Tennessee 148 U. S. 503, 519, 13 S. Ct. 728, 734, 37 L. Ed. 537 (1893), it is arguable at best that the amendment at issue falls within the compact clause mandate. Moreover, by Section 2 of the 1921 and 1922 resolutions approving the Compact and Plan, Congress expressly reserved to itself the "right to alter, amend, or repeal this resolution", thereby retaining a veto over subsequent state enactments. 42 U. S. Stat., at 180 and 826, *supra,* fn. 3. Thus the power to redress the imbalance of which plaintiffs complain, inheres not in the federal courts, but in the Congress itself.

For analogous reasons, I conclude that plaintiffs have failed to raise a substantial question of infringement of the commerce clause of the Constitution. Taking as true plaintiffs' allegations that the transit amendment substantially abrogated the Port Authority's power to plan for and effectuate comprehensive passenger transportation facilities in the port district, such abrogation, in my view, is not the kind of interference with interstate commerce to which the commerce clause was directed. Plaintiffs offer no authority for the proposition, implicit in their contention, that states, acting severally or cooperatively, have any affirmative constitutional duty to expedite the flow of interstate commerce.

[3] The import of the commerce clause is to vest supreme regulatory authority in the Congress. Implicit in this grant is the negative power, of which the federal courts are the final arbiter, to proscribe or invalidate state action which places unreasonable obstacles in the path of interstate commerce. Implicit also is the affirmative power to enhance the flow of commerce. While this affirmative congressional power does not necessarily divest the states of such concurrent, albeit subservient, authority, a commerce clause question does not arise from a state's failure to exercise this residual authority. See Southern Pacific Co. v. Arizona, 325 U. S. 761, 766-770, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945). Thus, plaintiffs' invocation of federal jurisdiction on the ground that the transit amendment violates the commerce clause must fail.

[4, 5] Plaintiffs' other theory of federal jurisdiction —that the transit amendment achieved an impermissible and irreversible conditioning of legislative sovereignty upon private consent—though ingenious, does not withstand analysis. Indeed, nowhere is it analyzed in plaintiffs' own papers. Whereas substantial impairment of the democratic process may present a justiciable due process question, the so-called "legislative divestment" does not. Compare e.g. Reitman v. Mulkey, 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967), Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) and its progeny. Not only is plaintiffs' contention—premature at this time—that the delegation to the bondholders is irrevocable a highly questionable one, see Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 427-439, 54 S. Ct. 231, 78 L. Ed. 413 (1934), Trustees of Dartmouth College

v. Woodward, 4 Wheat. 518, at 712, 4 L. Ed. 629 (concurring opinion of Justice Story) (1819); but, from a pragmatic point of view, the transit amendment's constraint upon non-self-supporting rail facilities does not even temporarily preclude the state legislature from dealing with mass transit problems by other means, e.g. by enactment of subsidy programs. In these circumstances, the constitutional infringement claimed is illusory.

Since no federal constitutional claim survives and since the construction of the compact is not otherwise in question, see *Bondholders, supra,* 387 F. 2d at 263 (dicta), this court has no authority to adjudicate related state-law based issues.

In view of plaintiffs' failure to state a substantial federal question, I deem it unnecessary to consider defendants' contentions respecting the absence of the requisite jurisdictional amount, the standing of plaintiffs and the advisory nature of any decision on the merits.

The motion to dismiss this action pursuant to 28 U. S. C. § 1331(a) is granted.

It is so ordered.

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FILED
SEP 22 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-323

THEODORE W. KHEEL, *et al.*, on behalf of themselves and all other persons similarly situated,

Petitioners,

against

THE PORT OF NEW YORK AUTHORITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Dated: September 22, 1972

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Opinions Below

Petitioners seek a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit, affirming the decision of the District Court for the Southern District of New York, dismissing their complaint for lack of Federal Court jurisdiction. The Court of Appeals' opinion, written by Judge J. Joseph Smith, is reported at 457 F.2d 46 and that of the District Court, written by Judge Harold R. Tyler, is reported at 331 F. Supp. 118.

Statement

This is an action by two New York State Assemblymen and four other individuals who allege that the Port Authority of New York and New Jersey is not fulfilling its duties relating to mass transit. The complaint seeks an order mandating the Port Authority "to formulate and submit" to the District Court or to a Special Master to be appointed by the District Court

> "a plan for the development of mass transportation facilities in the port district as requested by Governors Rockefeller and Cahill." Amended complaint, prayer for relief, para. (f).

The complaint refers to the Governors' desire that the Port Authority (a) effectuate rail access to Kennedy and Newark Airports, (b) take-over Pennsylvania Railroad Station in Newark, New Jersey, and (c) conduct a feasibility study of a new passenger railroad tunnel under the Hudson River between New York and New Jersey. The complaint also seeks a declaration that a 1962 bi-State legislative covenant, which partially restricts the use of Port Authority funds for non-selfsupporting passenger rail transit, is invalid on a host of federal and state constitutional grounds.

The Court of Appeals dismissed the suit for lack of the jurisdictional amount required under 28 U.S.C. § 1331.[1]

---

[1] It is also our view, which we argued at length in the courts below, that "federal question" jurisdiction is lacking since the federal constitutional questions contained in petitioners' complaint are raised as replies to a defense which petitioners anticipate the respondents will make. It is, of course, well settled that "federal question" jurisdiction cannot be founded on such a hypothesis. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Gully* v. *& Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908); *Tennessee* v. *First National Bank in Meridian*, 299 U.S. 109 (1936); *Louisville Union & Planters' Bank*, 152 U.S. 454 (1894).

The petition for certiorari asks this Court to consider the following two questions:

> "1. For the purpose of determining whether the amount in controversy exceeds $10,000, may the petitioners aggregate their damages or the value of the benefits to be achieved where petitioners' interests in the suit are common and undivided and are a matter of major importance to the 18,000,000 residents of the port district?
>
> "2. Does an appellate court err when it makes findings of fact with respect to jurisdictional issues which determine the merits of the law suit without giving petitioners the opportunity to prove the error of the Court's findings of fact?" (Petition, pp. 2-3).

Argument

There are three separate and independent reasons why a writ of certiorari should not be granted. First, petitioners have totally failed to set forth any substantial reason why their petition should be granted. Second, neither of the questions presented in the petition was raised in the courts below. Third, petitioners' arguments with regard to both aggregation and the need for a factual hearing are so obviously wrong on the merits that the issuance of a writ of certiorari would be unwarranted.

1. Apparently, petitioners have failed to perceive the purpose of a petition for a writ of certiorari. Instead of attempting to set forth reasons why a writ of certiorari should be granted, petitioners argue the merits of the controversy. Thus, contrary to the basic requirements of Rules 19 and 23(1)(h) of this Court, petitioners do not show any conflict in decisions between the Courts of Appeals, any important question of Federal law which should be decided by this Court, or any conflict between the decision in the instant case and a decision rendered by this Court.

2. Although petitioners have, in both courts below, argued that they satisfied the jurisdictional amount requirement of 28 U.S.C. § 1331, at no time prior to the decision by the Second Circuit did petitioners claim that they had a right to aggregate damages or that it was necessary to hold a hearing to decide the jurisdictional amount question. When the lack of the requisite jurisdictional amount was urged by respondents in the District Court as a ground for dismissing the action, petitioners did not request a hearing but instead submitted an affidavit by Theodore W. Kheel which attempted to show that the damages of each of the named plaintiffs and in particular Mr. Kheel was in excess of $10,000. In pertinent part, the Kheel affidavit alleges that

> "4. . . . because of the increasing undependability and unreliability of mass transportation, I have been forced to use other means of transportation, primarily taxicabs. In an average week, I spend over $35 on taxicabs getting to and from business and professional appointments. I estimate that this expenditure is at least $25 per week more than I would spend if I could rely on the existent mass transportation system in the Port District.
>
> "5. It is clear that the inadequacies of our mass transportation system cost me over $1350 per year, and if I continue to perform my professional duties until normal retirement age (I am presently 57), this expenditure will exceed $10,000 by that time.
>
> * * * *
>
> "7. Of the other plaintiffs, G. Oliver Koppell, Chester Straub and Robert Kheel are also attorneys practicing in New York City, and they are confronted with the same problems in traveling as I am. They are much younger men and no doubt the damages each will suffer during the course of their professional careers will far exceed those which I will sustain. Plaintiffs Ronald W. Haughton and D'Jaris H. Watson are, respectively, President and Vice President of the Board of Mediation for Community

Disputes and mediators and arbitrators in New York City. Their duties require them to travel in the City as much, if not more than the plaintiff attorneys.

"8. It is apparent that the unsatisfactory condition of the mass transportation facilities described in the amended complaint are directly causing monetary damage to *each* of the plaintiffs, and that these damages will continue throughout the professional careers of *each* if such conditions are not corrected. The amount in controversy clearly exceeds $10,000 with respect to *each* of the plaintiffs." (Emphasis added)

This affidavit was part of the Record on Appeal to the Second Circuit, which record, on respondents' request, has been certified to this Court.

Any doubt that the jurisdictional amount issue in the instant case properly rests upon the adequacy of the above allegations contained in the Kheel affidavit is dispelled by the petitioners' own briefs to the Second Circuit. In answer to respondents' contention that the damages alleged were too speculative to satisfy the jurisdictional amount requirement, petitioners did not argue, as they do now, that they were entitled to a factual hearing. Instead, they stated on page 13 of their reply brief that "for jurisdictional purposes, they rely *solely* upon their out-of-pocket expenses incurred prior to the commencement of this action and which they will continue to incur in performing their professional duties." (Emphasis added) Thus, petitioners had the opportunity to submit factual evidence, did in fact submit such evidence, and chose to rely solely on such evidence. Under these circumstances petitioners cannot now complain that they had no factual hearing.

Likewise since there is not one word with regard to aggregation contained in any of petitioners' briefs to the

courts below they cannot now for the first time argue that aggregation should have been permitted. In the words of this Court, "where issues are neither raised nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

3. Turning briefly to the merits of the controversy it is evident that even if the prior objections to the issuance of a writ of certiorari were lacking, it is so clear that petitioners' claims are erroneous that review by this Court is unwarranted.

The insurmountable jurisdictional obstacle which petitioners face here is that their damages are, as the Second Circuit has ruled, too speculative, remote and indirect to meet the $10,000 test. What is in controversy here is the presence or absence of a statutory duty on the Port Authority's part to become further involved in deficit passenger railroad activities. But the existence or non-existence of such a duty cannot be reduced to a monetary standard. Therefore, even if petitioners were ultimately successful in this litigation and a Federal Court were to order the Port Authority both to prepare and effectuate a mass transit plan, it would still be the height of speculation to hypothesize that passenger rail transportation would thereby be so improved that the petitioners would stop using taxicabs and recommence using mass transportation facilities. The Second Circuit, accepting the uncontested factual allegations of petitioners' affidavit as true, held, as a matter of law, that even if petitioners were successful, they

> "would receive no direct economic benefit, for the desired new subways and buses would be far from realization. At this point it is pure conjecture to suggest when they would appear and how much money they would save plaintiffs." 457 F.2d 46, 49.

Petitioners now contend that "the Court of Appeals conclusion in the absence of any record support that the slowness with which subways are constructed precludes a plaintiff from benefiting in an amount in excess of $10,000 is cavalier, pessimistic and erroneous." (Petition, p. 17). Yet, petitioners' own memorandum of law to the District Court acknowledged that "a mass transportation facility does not come into existence overnight. The lead time from the drawing boards to the completed facility is measured in decades." (page 7)

In view of the Second Circuit's determination that it is the quality rather than the quantity of damages which is legally insufficient, petitioners' argument on aggregation is irrelevant.[2] From the viewpoint of each petitioner or all petitioners the damages alleged are too speculative to satisfy the jurisdictional amount requirement.

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[2] Moreover, aggregation is not permitted in this type of case. Petitioners interests are not "common and undivided" any more than were the interests asserted in the two cases denying aggregation upon which they apparently rely—*Snyder* v. *Harris* (a stockholder's action) and *Gas Service Co.* v. *Coburn* (utility customer alleging overcharge of all customers), both reported at 394 U.S. 332 (1969).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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